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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY HOLT HERRMANN,

Defendant and Appellant.

E059815

(Super.Ct.No. SWF1301076)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge.

Affirmed.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Robin Urbanski, and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jeffrey Holt Herrmann and his wife Rhonda, had recently separated after 27 years of marriage and she had moved out of the family home. Rhonda returned to the home to visit with her daughter, and she and defendant got into an argument. Defendant pushed Rhonda into a wall and she fell to the ground. She lay motionless on the ground until a police officer arrived and woke her up. Defendant was convicted of corporal injury to a spouse, assault causing great bodily injury and bodily injury enhancements for both convictions.

Defendant now contends on appeal as follows:

1. The prosecutor committed misconduct during closing argument.
2. The trial court erred by refusing to reduce his felony convictions to misdemeanors pursuant to Penal Code section 17, subdivision (b).¹

We conclude the prosecutor did not commit misconduct, and even if there was misconduct, it was not prejudicial. Further, the trial court's refusal to reduce defendant's convictions to misdemeanors was neither irrational nor arbitrary. We affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a Riverside County jury of corporal injury on a spouse (§ 273.5, subd. (a)) and assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)). The jury found true the allegations for both counts that during the commission of the offenses, defendant personally inflicted great bodily injury under circumstances involving domestic violence within the meaning of section 12022.7, subdivision (e). Defendant's motion to reduce his convictions to misdemeanors pursuant to section 17, subdivision (b) was denied. The trial court granted defendant five years of formal probation and he was ordered to serve 180 days in county jail.

II

FACTUAL BACKGROUND

A. *Rhonda's Testimony*

Rhonda and defendant had been married for 27 years and had three children together. On September 9, 2012, she and defendant had separated and she had moved from the home they shared on Sapphire Place in Hemet. Defendant remained in the home and their 20-year-old daughter Brittany lived with him. Rhonda insisted that she and defendant had a good relationship but defendant was not paying their bills. She moved out so that he would have to be responsible for taking care of his finances.

When she moved out of the Sapphire Place house, Rhonda moved in with an old friend named Tom in Lancaster. However, every month or six weeks, she returned to the Sapphire Place home for the weekend in order to spend time with Brittany.

On March 9, 2013, Rhonda was at the Sapphire Place house visiting. She was making dinner and drinking beer. She estimated she drank five or six 24-ounce beers that evening. Defendant was also drinking.

Rhonda told defendant that she intended to return to Lancaster. Defendant did not want her to go; he wanted her to move back in with him. They started arguing. Defendant accused Rhonda of having sex with Tom. She did not recall if she denied the accusation.² Defendant gathered the remaining belongings that Rhonda had at the home and put them by the front door.

Rhonda could not find her cigarettes; she suspected defendant hid them. She noticed they were in the pocket of his sweater. She reached for them several times but he would not allow her to take them out his pocket. Rhonda indicated that defendant “lightly pushed” her with one hand against her sternum. She did not recall if she was pushed into a wall or door. She did not recall falling to the floor. She heard defendant calling 911 while she was on the floor. Defendant told her several times that he was calling 911, but she did not respond. She remembered that while she was on the ground, defendant kissed her on the face and said “don’t do this to me.”

² Rhonda had a relationship with Tom when she first went to live with him but not on March 9, 2013.

Rhonda recalled a police officer standing over her while she was lying on her back. She recalled that the officer rubbed her sternum as she was getting ready to sit up. The only thing she remembered as to how she got on her back was that she had an anxiety and panic attack. When she suffered from panic attacks, she was rendered frozen stiff and could not move. She thought she was conscious the entire time she was on the ground because she heard defendant call 911.

She could not recall talking to the police officer. She did not recall advising the officer that she did not want to prosecute because she would have nowhere to live. She did not recall telling the officer that she had been having a panic attack; she believed she told the paramedics in order to explain her high blood pressure.

Rhonda had previously testified that she was lying on the ground to scare defendant. She fell asleep because she had been drinking. She was never unconscious. She sustained no injuries. She could not explain how she was asleep but also heard defendant call 911. Rhonda indicated that defendant had lost his job because of what had happened. She planned to stay married to defendant and get back together with him once he was able to find employment.

B. *911 Call*

The 911 call made by defendant was played for the jury. Defendant advised the 911 operator, “Yes, I, I need an ambulance here quick.” When asked what the problem was, he responded, “Well, my, my wife and I kinda struggled and she’s got heart, ah, she takes heart medicine and she’s on the ground and she’s breathing but her face is beet red and she’s not responding.”

C. *Testimony of Hemet Police Officer Katie Snell*

Hemet Police Officer Katie Snell had responded to numerous domestic violence calls as a police officer. She had first aid training, which included training on how to deal with an unconscious person. She described an unconscious person as someone who was not responding. She had been trained to first check for breathing; then to attempt to awaken the person by saying their name and making loud noises; and if that did not work, she had been trained to rub the person’s sternum.

Officer Snell was called to the Sapphire Place house in response to defendant’s 911 call. Officer Snell found Rhonda lying on her back in the front entryway. She was about two to three feet from the front door. She was not moving or speaking. Her eyes were closed. Officer Snell shook and slapped her arm to get her to respond. She did not move and her eyes remained closed. Officer Snell considered her to be unconscious because, although she was breathing, she was unresponsive to anything around her.

Officer Snell rubbed her sternum for approximately 15 to 20 seconds. Rhonda opened her eyes and gasped for air. Rhonda asked Officer Snell who she was and what she was doing there. Rhonda appeared confused. Officer Snell instructed her not to

move in case she had any injuries. When the paramedics arrived, Rhonda was still lying on her back. She told the paramedics she had pain in the back of her neck and head.

Officer Snell spoke with Rhonda after the paramedics evaluated her. Rhonda told her that she was on the ground because defendant had pushed her body against the wall and the door. She fell on the ground. She could not remember anything from the time she fell to the ground until the time she was awakened by Officer Snell. Rhonda never told Officer Snell that she ended up on the floor because she was having an anxiety or panic attack. She did not tell Officer Snell that she heard defendant calling 911.

Rhonda told Officer Snell that she was unsure whether she wanted defendant prosecuted because she would not have a place to live. Rhonda never mentioned that she reached into defendant's pocket to retrieve her cigarettes. Rhonda had no visible injuries. She smelled of alcohol.

Defendant presented no evidence on his behalf.

III

PROSECUTORIAL MISCONDUCT

Defendant asserts that the jury was faced with two options: believe Rhonda's trial testimony that she had a panic attack, or believe the evidence that defendant pushed her into the wall or door rendering her unconscious. Defendant insists that the prosecutor committed misconduct during closing argument when he argued that this was a "classic domestic violence case" and that the jurors did not need an expert to explain that she was a battered woman who was dishonestly recanting her allegations against defendant because it was common knowledge that victims of domestic violence recant. Defendant

insists that this argument improperly referred to evidence outside the record and the prosecutor improperly vouched for its position.

A. *Additional Factual Background*

Rhonda testified at the preliminary hearing that defendant had “shoved” her. She insisted that she reached to grab her cigarettes from his pocket and he pushed her aside. He pushed her on her chest and she was pushed backward. She tripped over a pile of clothes near the front door. She also claimed she suffered from anxiety. The argument put her in a “panic” and she passed out. Next thing she recalled was an officer standing over her. She insisted she “purposely” laid on the ground to scare defendant. She had been drinking and fell asleep. The panic attack caused her to black out. Rhonda then testified at trial; Officer Snell’s differing testimony regarding the statements Rhonda made to her that night were presented to the jury as set forth, *ante*.

Prior to the evidence being presented and just prior to closing arguments by both counsel, the jury was instructed that “You must use only the evidence that is presented in the courtroom.” They were also instructed, “Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence.” They were also advised “You alone must judge the credibility or believability of the witnesses.” In evaluating witness testimony they were to consider “What was the witness’s behavior while testifying?” Further, they were advised to consider “Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?”

The prosecutor argued during opening that Rhonda was biased because she did not want her husband of 27 years to be convicted. In response, defense counsel argued that Rhonda's testimony at trial and at the preliminary hearing was consistent. In addition, there was no great bodily injury because she was not unconscious.

In his closing argument, the prosecutor addressed defense counsel's argument that Rhonda was consistent in her testimony at trial and the preliminary hearing. He argued, "But as I told you earlier, ladies and gentlemen, that testimony is only useful to you as jurors to the extent that you believe it. If you don't believe that testimony, it's not useful for you. It doesn't help you come to a determination of what happened on March 9th except for the fact that it shows you that witness is not being truthful, and that's what happened in this case. [¶] This case was the quintessential recanting domestic violence case. Classic case. A woman who has been married to this defendant for 27 years, who had multiple children, a recanting domestic violence victim. You don't have to be an expert in domestic violence to understand the dynamics of that. Everybody who has grown up in modern society understands that dynamic of a woman who is assaulted, who is battered, but for a myriad of reasons recants at trial." There was no objection made by defense counsel.

B. *Forfeiture*

““In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.” [Citation.]” (*People v. Gonzales* (2011) 51 Cal.4th 894, 920.)

Defendant’s counsel did not object to the prosecutor’s argument that he now contends on appeal was misconduct. Respondent argues the argument was forfeited by this failure to contemporaneously object and request a jury admonition. Defendant claims that an objection to the argument would have been futile and that an admonition would not have cured the harm. In the alternative, he claims he received ineffective assistance of counsel due to his counsel’s failure to properly object. Rather than engage in a lengthy discussion of these issues, and for the sake of judicial economy, we will the address the merits of defendant’s prosecutorial misconduct claim.

C. *Prosecutorial Misconduct*

““A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.’ [Citation.]” (*People v. Montes* (2014) 58 Cal.4th 809, 869; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 679.)

Generally, “““a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]”””” (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Also, although a defendant may “single[] out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the statements in the context of the argument as a whole.” (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

It is well settled that a prosecutor generally may not vouch for the credibility of prosecution witnesses. (*People v. Anderson* (1990) 52 Cal.3d 453, 479.) This occurs “where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness’s veracity or suggests that information not presented to the jury supports the witness’s testimony. [Citations.]” (*People v. Fierro* (1991) 1 Cal.4th 173, 211.) “However, so long as a prosecutor’s assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the ‘facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,’ [his or] her comments cannot be characterized as improper vouching. [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) Moreover, “[L]ay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process.” (*People v. Pride* (1992) 3 Cal.4th 195, 268.)

Here, the jury heard evidence of defendant’s statement to the 911 operator that he and Rhonda had struggled. He was concerned that she was still on the ground, her face

was beet red and she was not responding. When Officer Snell arrived, Rhonda was unresponsive. Only after Officer Snell rubbed her sternum - - as she had been trained to do for unconscious persons - - did Rhonda respond. She immediately gasped for air and was confused. At that time, Rhonda told Officer Snell that defendant pushed her against the wall and door and she fell on the ground. Rhonda could not recall anything from the time she fell on the ground until Officer Snell arrived. She said nothing about being conscious and hearing defendant calling 911, or that she had a panic attack.

At the preliminary hearing and trial, Rhonda changed her story. She claimed that defendant pushed her and she fell over some clothes. She also insisted that she was trying to scare defendant by remaining on the ground and then fell asleep because she had been drinking. At trial, she claimed that defendant lightly pushed her when she reached for her cigarettes in his pocket. She was unsure how she fell, but she had an anxiety attack which resulted in her being frozen stiff and unable to respond.

This evidence, combined with the jurors' common experience, allowed the prosecutor to argue to the jury that they could draw reasonable inferences about the behavior of victims of domestic violence. The prosecutor's argument was in the context of how the jury should view Rhonda's inconsistent testimony and whether she was truthful at the time of the incident or at trial. The prosecutor properly inferred from the evidence that Rhonda was reluctant to testify against defendant because they had been married for 27 years and he was the father of her children. The jury was tasked with determining Rhonda's credibility and the prosecutor could argue to the jury, based on

their own common experiences, and the evidence, that like in most domestic violence cases, the jury could infer Rhonda lied in her trial testimony.

Defendant contends that the prosecutor's argument was contrary to the law because dynamics of abuse and victims recanting are not generally known. It is well recognized that expert testimony regarding domestic violence, battered women's syndrome, and the cycle of violence is admissible because it is sufficiently beyond common experience and "relevant to explain that it is common for people who have been physically and mentally abused to act in ways that may be difficult for a layperson to understand. [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 293.)

The prosecutor's argument was not contrary to the law. The prosecutor merely argued it was common sense that victims of domestic abuse recant their original statements. The prosecutor did not attempt to explain the dynamics of the decision or explicate the cycle of violence. The matters addressed by the prosecutor were not beyond common experience as they were merely a comment on how the jury was to view Rhonda's credibility.

Based on the foregoing, no prosecutorial misconduct occurred. As such, defendant has failed to meet his burden of establishing ineffective assistance of counsel. "“It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] We have summarized defendant's burden as follows: “In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.] Second, he must also show

prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome' [Citation.] [¶]

Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'

[Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.) Counsel was not deficient in failing to object to the argument by the prosecutor.

D. *Prejudice*

Moreover, even if we were to conclude that the prosecutor committed misconduct, reversal is not required as “‘it is [not] reasonably probable that a result more favorable to the defendant would have been reached without the misconduct’” [citation]” (*People v. Davis* (2009) 46 Cal.4th 539, 612) or that the conduct infected the trial with such unfairness as to result in a denial of due process (*Darden v. Wainwright* (1986) 477 U.S. 168, 181).

Initially, the jurors were instructed that “Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence.” They were also advised “You alone must judge the credibility or believability of the witnesses.” In evaluating witness testimony they were to consider “What was the witness’s behavior while testifying?” We presume that the jury understood and followed the instruction. (*People v. Fauber* (1992) 2 Cal.4th

792, 823.) As such, even if the argument by the prosecutor could be interpreted to introduce additional outside evidence, or it could somehow be interpreted that the prosecutor was “vouching” for its position that Rhonda lied at trial, the jury is presumed to have ignored it.

Moreover, the jury could reasonably conclude that she was the victim of domestic violence at the hands of defendant based on other evidence presented in the case. Defendant contacted 911 and stated he and Rhonda had struggled. He admitted that Rhonda fell to the ground, her face was beet red and she was not responsive. When Officer Snell arrived, Rhonda was still on the ground and unresponsive. The jury could reasonably infer that Rhonda was rendered unconscious by defendant’s acts.

Based on the foregoing, we find that any misconduct committed by the prosecutor was not prejudicial. It follows that if we were to conclude that defendant received ineffective assistance of counsel due to his counsel’s failure to object, he could not establish prejudice. (*People v. Vines, supra*, 51 Cal.4th at pp. 875-876.) We reject defendant’s claim that reversal is warranted.

IV

PENAL CODE SECTION 17, SUBDIVISION (b) MOTION

Defendant contends the trial court abused its discretion by denying his motion to reduce his convictions to misdemeanors pursuant to section 17, subdivision (b).

A. *Additional Factual Background*

At the time of sentencing, the trial court noted in its tentative disposition that it was going to conclude this was an “unusual situation” that warranted granting probation to defendant. The trial court noted that defendant had a minimal criminal record and he reported the event to law enforcement. The trial court did note that it found the situation was serious because “my concern here is we had a middle-aged woman who was, basically, out cold, and that’s dangerous. I think there was also some testimony that when she woke up, she was gasping for air. So my question at that point is, was she breathing? We don’t know. But that’s a dangerous situation.”

The prosecutor agreed that the case warranted probation on the ground that the facts or circumstances giving rise to the limitation on probation was substantially less serious than the circumstances typically present in other cases involving the same probation limitation. The prosecutor noted that of all the great bodily injury he had seen in domestic violence cases he had prosecuted, the injuries here were “on the lower end.” However, the prosecutor did note that Rhonda had been knocked unconscious and that this could result in acute and chronic problems although Rhonda had not reported any lasting problems.

The trial court then reviewed the section 17, subdivision (b) motion filed by defendant. In his written motion, defendant argued that the trial court should look to the rules for granting probation and mitigating factors in sentencing in determining the section 17, subdivision (b) motion. Defendant argued that the crime was less serious than other similar crimes; he was not armed; Rhonda was not a vulnerable victim; she had a prior arrest for committing domestic battery on defendant; she had no visible injuries; he did not take advantage of a position of trust; and the crime was not sophisticated.

In the People's sentencing memorandum, they opposed reducing the crimes. They argued that defendant committed a violent crime against a vulnerable victim; since defendant was convicted of two violent crimes, protecting society would not be served by reducing the crimes; reducing the crimes was not an appropriate punishment in relation to the crimes; reducing the crimes would not meet the goal of deterring defendant and others from committing these crimes; and uniformity in sentencing supported the felonies.

The trial court ruled as follows: "As to reducing this to a misdemeanor, the Court is not inclined to do that. The Court has already indicated that the Court believes this is a very serious matter. [¶] You know, I was working in the San Diego juvenile court last month, and we had a situation occur where a young woman was actually semi-asphyxiated for a very short period of time, three to four minutes, and she subsequently died. It's amazing to know that when a person is without air for even three minutes, it can affect the rest of the body to a point they will die. That's why - - I've been handling these cases for 36 years, these kind of domestic violence, violent cases, and sometimes it's - - it's almost easier to prosecute or to deal with a case where we have severe broken

bones or - - where we have some of these violent activities that we see compared to those, like this case, where there's more emotional damage, there's more damage possibly within the body. The fact that a person passes out is very serious. [¶] I guess I'm saying that it - - I don't want to minimize this case just because this woman doesn't have bruises and broken bones. I consider it a very serious case. [¶] I think that the victim in the case was also extremely vulnerable. We are always vulnerable trying to deal with our families. Also, the defendant inflicted physical and emotional injury on his victim, and, finally, the defendant took advantage of a position of trust and confidence. Based on all of that, I believe this case was probably violent, and it's not a misdemeanor. At this point it is a felony.”

B. *Analysis*

Section 17, subdivision (b) gives a trial court discretion to reduce an offense charged as a felony to a misdemeanor if the offense is a “wobbler,” i.e., chargeable either as a felony or as a misdemeanor, upon imposition of a punishment other than state prison (§ 17, subd. (b)(1)) or by declaration as a misdemeanor after a grant of probation (§ 17, subd. (b)(3)). (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974 (*Alvarez*) disapproved on other grounds in *People v. Williams* (2005) 35 Cal.4th 817, 832.) Corporal injury to a spouse is a wobbler offense. (§ 273.5, subd. (a).) In *People v. Feyrer* (2010) 48 Cal.4th 426, 444, the Supreme Court held that a defendant's admission to an enhancement for personal infliction of great bodily injury did not automatically convert a wobbler for assault by means of force likely to cause great bodily injury under section 245, subdivision (a), into a straight felony.

In *Alvarez, supra*, 14 Cal.4th 968, the court evaluated how a motion to reduce a conviction to misdemeanor conviction should be considered. “We find scant judicial authority explicating any criteria that inform the exercise of section 17[, subdivision] (b) discretion. [Citation.] However, since all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including ‘the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’ [Citations.] When appropriate, judges should also consider the general objectives of sentencing The corollary is that even under the broad authority conferred by section 17[, subdivision] (b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest ‘exceeds the bounds of reason.’ [Citation.]” (*Id.* at p. 978.)

“A court ha[s] broad discretion under section 17, subdivision (b) in deciding whether to reduce a wobbler offense to a misdemeanor. [Citation.] We will not disturb the court’s decision on appeal unless the party attacking the decision clearly shows the decision was irrational or arbitrary. [Citation.] Absent such a showing, we presume the court acted to achieve legitimate sentencing objectives. [Citation.]” (*People v. Sy* (2014) 223 Cal.App.4th 44, 66.)

Here, we cannot conclude that the trial court’s decision was irrational or arbitrary. The jury determined that defendant pushed Rhonda and that she was rendered unconscious. The nature of the offense - - even though there were no visible injuries - - was properly considered by the trial court in determining that reduction to misdemeanors

was not appropriate. The trial court could properly analogize the potential for harm in this case to other cases involving non-evident injuries. It could also properly consider that Rhonda was a vulnerable victim. The trial court relied upon all of the circumstances involved and not just one factor, such as whether she was breathing. Defendant has provided no relevant case law and has provided no persuasive argument that supports that the trial court's decision in this case was irrational or arbitrary. As stated, the trial court had vast discretion in deciding whether to reduce the convictions to misdemeanors. (*People v. Sy, supra*, 223 Cal.App.4th at p. 66.) The trial court did not abuse its discretion by denying defendant's motion pursuant to section 17, subdivision (b).

V

DISPOSITION

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.